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United States Postal Service and American Postal Workers Union, Local 170. Case 08–CA–197451

August 23, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On May 25, 2018, Administrative Law Judge Thomas M. Randazzo issued the attached decision in this consolidated unfair labor practice and backpay proceeding. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order and supplemental Order, except that the attached notice is substituted for that of the administrative law judge.³

ORDER

The National Labor Relations Board adopts the recommended Order and Supplemental Order of the administrative law judge and orders that the Respondent, United States Postal Service, Toledo, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Orders, except that the attached notice is substituted for that of the administrative law judge.

¹ Chairman Ring is recused and took no part in the consideration of this case.

² There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally reducing the duration of paid breaks without providing the Union notice and opportunity to bargain over that change or the effects of that change.

For the reasons stated by the judge, we find that the Respondent's exceptions to the awarding of backpay here are without merit. Accord *Rangaire Co.*, 309 NLRB 1043, 1043 fn. 6 (1992) (ordering backpay for unilateral elimination of extended lunch periods on Thanksgiving), enf'd, 9 F.3d 104 (5th Cir. 1993) (Table); *Inland Steel Co.*, 259 NLRB 191 (1981) (ordering backpay for employees based on the elimination of 5 minutes of "washup time" and a 10-minute reduction in paid lunch break). We additionally emphasize that neither Sec. 10(b) of the Act nor Board law or procedures provide support for the Respondent's argument with respect to the backpay remedy.

³ We shall substitute a new notice to conform to the Board's standard remedial language.

Dated, Washington, D.C. August 23, 2018

Mark Gaston Pearce, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the American Postal Workers Union, Local 170 (the Union) by changing the terms and conditions of employment of our unit employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole bargaining unit employees for any loss of earnings and other benefits you may have suffered as a result of the unilateral reduction in break times in effect from March 25, 2017, to September 26, 2017, in the manner set forth in the remedy section of this decision.

UNITED STATES POSTAL SERVICE

The Board's decision can be found at www.nlr.gov/case/08-CA-197451 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Stephen M. Pincus, Esq. and *Rudra Choudhury, Esq.*, for the General Counsel.

Dallas G. Kingsbury, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Bowling Green, Ohio, on March 7, 2018. The American Postal Workers Union, Local 170 (the Union or Charging Party) filed the instant charge on April 21, 2017,¹ and the General Counsel issued the complaint on August 29, 2017. On February 12, 2018, the complaint was amended and consolidated with a compliance specification alleging the make-whole remedy owed to unit employees for any losses suffered as a result of Respondent's alleged unfair labor practices. The amended complaint/compliance specification alleges that the United States Postal Service (the Respondent), from on or about March 18, 2017, through about September 26, 2017, reduced paid break periods from 15 to 10 minutes for employees at the facility in Toledo, Ohio, without providing prior notice to the Union and/or without affording the Union the opportunity to bargain over that change and the effects of that change, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). In addition, the compliance specification alleges that the backpay period for the unit employees began on March 25, 2017.²

The Respondent denied in its answers to the complaint and amended complaint/compliance specification that it violated the Act as alleged. It also alleged that if a violation occurred, the remedy should not include backpay for the affected employees. Notwithstanding that assertion, at trial the Respondent stipulated to the backpay calculations and amounts as set forth in Joint Exhibit 1 in the event that it is found to have violated the Act.³

¹ All dates are in 2017 unless otherwise indicated.

² At trial, the General Counsel's motion to amend the consolidated complaint/compliance specification pars. 10 and 11 to allege that the backpay period began on March 25, 2017 (instead of March 18, 2017), was granted. (Tr. 15.)

³ The General Counsel's motion at trial was granted to substitute the calculations and figures set forth in Jt. Exh. 1 for the calculations and figures in pars. 12 and 13 of the consolidated complaint/compliance specification. (Tr. 11-14.)

On the basis of the entire record,⁴ my determination of credible evidence,⁵ and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that the National Labor Relations Board (the Board) has jurisdiction over it by virtue of Section 1209 of the Postal Reorganization Act (PRA), and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

The Respondent provides postal services and operates various facilities throughout the United States in performing that function, including its Vehicle Maintenance Facility in Toledo, Ohio (Respondent's facility). The Respondent's facility provides maintenance for approximately 900 postal vehicles, which include repairs for those vehicles when they break down. The Respondent's facility is managed by Robert L. Price and its supervisor is Tom Baker.⁶

The Respondent employs 17 technicians, 3 clerks, and 1 custodian at its facility, all of whom are represented by the Union. At all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of those employees who constitute the following described unit:

All maintenance employees, motor vehicle employees, postal clerks, the special delivery messengers, mail equipment shops employees, material distribution centers employees, and operating services and facilities services employees; and excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined in Public Law 91-375, 1201(2), all Postal Inspection Service employees, employees in the supplemental work forces as defined in Article 7 of the Collective-Bargaining Agreement, rural letter carriers, mail handlers, and letter carriers.

The Respondent's recognition of the Union as the collective-bargaining representative of the Unit employees has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 21, 2015, to September 20, 2018.

With regard to changes or proposed changes in working con-

⁴ Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for the General Counsel's Brief; and "R. Br." for Respondent's Brief.

⁵ In making my findings regarding the credible evidence, including the credibility of witnesses, I considered the testimonial demeanor of such witnesses, the content of their testimony, and the inherent probabilities based on the record as a whole.

⁶ Baker is an admitted supervisor and agent within the meaning of Section 2(11) and (13) of the Act.

ditions, Motor Vehicle Craft Director and Union Official Michael Fincher testified that such communications with management have usually been through mail or emails. (Tr. 42–43.) He also testified that in the past, the Respondent has notified the Union of changes in writing. As an example, Fincher testified that in February 2017, the Respondent notified the Union in writing of its desire to make a change in working conditions by sending a letter dated February 13, 2017, from Price to Union President Arnie Cowell regarding “VMF hours of operation.” (Tr. 43–44; GC Exh. 3.) In that letter, Price informed Cowell that, as a courtesy, he was writing to inform him that the Respondent decided to change the hours of operation for the facility starting on February 25, 2017. Price indicated that such notice was to “help facilitate talks, training and group discussions between both tours...” (GC Exh. 3.) The record also shows that Respondent’s communications with the Union on matters affecting terms and conditions of employment, such as requests for information, were made by written letters sent priority mail for no cost. (Tr. 45–46; GC Exh. 4.)

2. The employees’ terms and conditions of employment included two 15 minute paid breaks at Respondent’s Vehicle Maintenance Facility in Toledo, Ohio

It is undisputed that the Respondent provided employees at its facility with two 15 minute paid breaks per each eight and one-half hour shift, which included a half-hour unpaid lunch break. (Tr. 26.) Employees are entitled to an additional break if they work longer than their 8-hour shift. The practice at the facility was that employees could take a break anytime up until lunchtime and they could schedule when they wanted to take their afternoon break.

3. The Vehicle Maintenance Facility Safety and Service employee meeting on March 3, 2017, where it announced the scheduling of lunches and breaks

a. The testimony of the General Counsel’s witnesses regarding the March 3 meeting

The Respondent conducts staff meetings referred to as “safety and service meetings” or “safety talks” every Friday where it discusses vehicle maintenance facility safety issues. (Tr. 27.) In the safety and service meeting on March 3, 2017, the Respondent’s management discussed schedule changes. The topics for the meeting were described on the “VMF Safety & Service Talks” sign-in sign sheet as: “Informed Delivery, Seat Belts Save Lives—When Used, Stainless Bolts for Fuel Sender Grounds, VMF Schedule, [and] Pop Machine Suggestions.” Id. There were 17 employees that signed-in as having attended that meeting, and one of those employees was Union Motor Vehicle Craft Director Fincher. (GC Exh. 7.)

Fincher testified that in the March 3 meeting, Supervisor Baker (who was also acting manager at that time) ran the meeting for the Respondent, but that Price was also in attendance. Prior to that meeting, it was not the Respondent’s practice to post work schedules because the employees knew what hours they worked based on their bids.⁷ (Tr. 31–32.) However, in

that meeting Baker made an announcement about scheduling to the entire group. (Tr. 31, 47.) According to Fincher, Baker said the Respondent would be posting a schedule. At that time, Price came out of his office and sat down in the meeting. He informed the employees that if they needed to take an hour-long lunch, to let him know and he would change it to an hour lunch. (Tr. 47.) Fincher testified that nothing else was said about scheduling. (Tr. 47–48, 60.) Fincher specifically stated that nothing was said about reducing the break times, and he was certain about that fact because reducing break times would have “stuck out to [him],” and when the meeting ended, he “would have had [employees] . . . demanding some action.” (Tr. 48, 60.)

Fincher’s testimony was corroborated by current employee Ronald Cowell, who testified that in the March 3 meeting Baker informed the employees that there was going to be scheduled lunches and breaks. He specifically testified that nothing was said about cutting break times, and he was sure of that fact because if that would have been said, he would not have been happy about it and he “would have had a discussion with the union....” (Tr. 117.) Thus, Cowell stated that when he left the meeting, he had no idea there was a plan to cut break times to 10 minutes. (Tr. 117.)

b. The testimony of the Respondent’s witnesses regarding the March 3 meeting

While the General Counsel’s witnesses testified that the Respondent’s managers never mentioned in the March 3 meeting that breaks were being reduced from 15 to 10 minutes, the Respondent’s witnesses testified that they recalled being informed that Respondent was reducing the breaks to 10 minutes. In that connection, Baker testified twice at trial, being called once by the General Counsel in its case-in-chief and once by the Respondent in the presentation of its case. In the General Counsel’s case, Baker vaguely asserted that he had made an announcement about “scheduling” to the entire group of employees. (Tr. 30–31.) With regard to the announcement to employees regarding scheduling, he admitted that prior to that March 3 meeting: (1) he never had a separate conversation with the Union about scheduling; (2) he never provided notice to the Union, written or otherwise, about the scheduling issues; (3) he never informed the Union that schedules would be posted at the facility when previously they were not; (4) he never discussed the decision to implement the schedule with the Union; and (5) he never informed the Union that employee breaks would be reduced from 15 minutes to 10 minutes. (Tr. 31–33.)

In the Respondent’s case, when Baker was asked what was said about break times, he testified that he talked about “needing to schedule lunches,” and that Respondent would reduce breaks from 15 to 10 minutes. (Tr. 68–69.) The Respondent also called employees Eric Schneider, Greg Piskula, and Stephen Recknagel, in support of its assertion that Baker announced breaks would be reduced to 10 minutes.

c. The credibility determinations

While it is undisputed that the Respondent held a Safety Meeting for employees at the Toledo facility on March 3, 2017, and that it discussed schedule changes such as the fact that it

⁷ For example, if the bid for that job started at 5 a.m., that was when the employee showed up for work. (Tr. 32.)

was going to begin posting a work schedule with scheduled times for employees' breaks and lunches, there is a dispute over whether the Respondent informed the employees in that meeting that break times were going to be reduced from 15 minutes to 10 minutes. The General Counsel's witnesses testified that the Respondent's managers never made any statements about breaks being reduced to 10 minutes, and conversely, the Respondent's witnesses asserted that management informed employees that it was reducing their breaks to 10 minutes. Since these testimonies differ, I must make determinations on the credibility of the witnesses.

Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enf'd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951).

My observation during the trial was that the General Counsel's witnesses appeared truthful and honest in their demeanor, and they testified in a consistent and convincing manner on direct and cross-examination. Specifically, I found Fincher to be a very credible witness who displayed a convincing demeanor and his testimony that management never mentioned that breaks would be reduced to 10 minutes in that meeting was plausible and believable. Fincher's testimony was also consistent with, and corroborated by, current employee Cowell on that key point. I also found that Cowell was a credible witness. He testified in a truthful manner and was very certain about the fact that Respondent's managers did not mention that break times were reduced to 10 minutes. He offered the basis for his certainty, testifying that he was certain it was not discussed because if it had been, he would have been unhappy about it and he would have discussed the matter with the Union. (Tr. 117.) Also, as a current employee who provided testimony adverse to the interests of his employer, I find his testimony was entitled to additional weight. The Board has held that where current employees provide testimony against the interests of their employer, and thus contrary to their own pecuniary interests, such testimony is entitled to additional weight when credited. *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); *PPG Aerospace Industries, Inc.*, 353 NLRB 103 (2008); *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006); *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995), aff'd. mem. 83 F.3d 419 (5th Cir. 1996).

The Respondent's witnesses, on the other hand, presented testimony that was vague and they were less credible in their assertions that management informed employees that break times were being reduced. Baker's testimony was at times vague and appeared to be less than forthright. He was particu-

larly vague with regard to whether he stated in the March 3 meeting that breaks were going to be reduced from 15 to 10 minutes. When specifically asked what he said in that meeting about break times, he answered: "We talked about needing to schedule lunches and also, due to the constant abuse of the breaks, that we'd reduce them from 15 to 10 minutes." (emphasis added) (Tr. 69–70). Thus, when asked directly to testify about what he allegedly said about break times, he instead vaguely provided what *either* he or Price told employees.⁸ In addition, when he was later asked what he told the Union on March 3rd about break times, Baker answered: "I informed the union, as well as all employees that breaks would be changing once we give the schedule." (Tr. 84.) His response to that question made no mention of telling the employees that the break times would be reduced to 10 minutes. Instead, only after prompting by Respondent counsel as to what specifically the breaks would be changed to did he assert that they would be 10 minutes. (Tr. 84.) In addition, Baker failed to state on redirect examination (as he did earlier on direct examination) that he mentioned "the constant abuse of breaks" on that subject.

I also found Respondent witnesses Schneider, Piskula, and Recknagel, who claimed that Baker said breaks would be reduced to 10 minutes, were less credible than the General Counsel's witnesses, and their recall not as accurate. In this regard, Schneider testified that he believed there was some discussion after that meeting about breaks, but he admitted that he "[did not] really recall what all was said." (Tr. 87.) He also seemed unsure of himself. When asked if in fact the breaks had been cut from 15 to 10 minutes, he answered "I believe so, yes." (Tr. 87.) It also appeared that the topic of break times being reduced was of little importance to Schneider because when he was asked on cross-examination if he liked having his breaks cut, he answered: "To be honest with you, it doesn't really matter to me." (Tr. 88.)

Piskula, who testified that he was told in that meeting that breaks "were going to go back to 10 minutes," also seemed to have difficulty with his recollection. In fact, he had difficulty remembering who allegedly announced that the breaks would be cut.⁹ I therefore find Piskula's testimony unpersuasive and provide it less weight. I also found Recknagel's testimony equally unpersuasive. He testified that in the March 3rd meeting, Baker "brought up a schedule change policy...where lunches would be scheduled and breaks would also be scheduled," and that after that meeting he believed the breaks were changed to 10 minutes. (Tr. 93–94.) However, when pressed

⁸ The Respondent did not call Price to testify in support of its case, and there is no evidence that Respondent attempted to subpoena Price to testify or that Price was unavailable to testify in this matter.

⁹ On that subject, Piskula provided the following testimony on cross-examination:

Q. [W]as it Mr. Price who made that comment there about the breaks being cut?

A. I don't believe so.

Q. Okay. You don't remember who said it?

A. Trying to remember. It's been—no, I think it was Tom [Baker], I think.

(Tr. 91.)

on cross-examination as to “what was exactly said,” he stated “[t]he policy that was proposed was that lunches . . . , from then forward, would be scheduled so that employees would have a set time to when they were to take their lunch break.” When asked if anything else was said about breaks or scheduling, Recknagel testified that Price said those who wanted to take a longer lunch could take a 45-minute or an hour lunch, and if they came to him for that, he would change their schedules. Finally, when asked if anything else was said about the scheduling of breaks during that meeting, Recknagel responded: “No. Just scheduling of breaks, scheduling of lunches.” (Tr. 97.) Thus, on cross-examination, he failed to specifically testify that reducing the breaks from 15 to 10 minutes was discussed by management at that meeting.

Based on the above, the assertions by Respondent’s witnesses that management informed employees in the March 3 meeting that breaks times were being reduced are not credible. In addition, such assertions are also implausible and not supported by the record evidence. As set forth more fully below, the Union filed a grievance alleging that Respondent’s scheduling of assigned breaks and lunches, and changing break times from 15 to 10 minutes, violated the collective-bargaining agreement. (GC Exh. 5.) Despite the fact that Respondent was clearly aware the Union was alleging the change in break times to 10 minutes violated the contract, the response to that grievance provided by Baker in the “Grievance Summary – Step 1” makes no mention of fact that it allegedly announced the reduction of break times in the March 3 meeting. (GC Exh. 7; Tr. 77–81.) I find it implausible that Baker would inform the employees in a meeting that break times were being reduced, and then neglect to mention that fact in the document where he set forth the background and facts for Respondent’s position on the grievance. In addition, Baker’s lack of credibility was further evinced by his explanation for failing to put that critical information in the document. Baker testified that his failure to mention such information was attributed to limited space on the grievance response form. (Tr. 78.) However, Baker acknowledged that there were at least 5 more available lines on the response form to place such information. (Tr. 78.)

Thus, the Respondent witnesses’ assertions that employees were informed in the March 3 meeting that break times would be reduced are not credible or supported by the undisputed documentary evidence. I therefore credit the General Counsel’s witnesses and find that the Respondent did not inform the employees in the March 3 meeting that break times were being reduced from 15 to 10 minutes.

4. On or about March 20, 2017, the Union became aware that Respondent posted a work schedule establishing that employee breaks were reduced from 15 to 10 minutes

Baker testified that on March 18, 2017, the Respondent posted the “Toledo VMF Schedule” for the week effective March 25–31, 2017. (Tr. 34–35; GC Exh. 2.) That schedule, signed by Supervisor Baker and dated March 18, 2017, established that the employees’ two breaks which were previously 15 minutes in duration were changed to 10 minutes, and that “[a]ny deviation from [the] posted schedule must be approved in advance by Management.” (GC Exh. 2; Tr. 36.) Baker admitted that the

posted schedule reflected a change in employee breaks. (Tr. 34.) It is also undisputed that from that time until the end of September 2017, schedules were consistently published and posted showing 10 minute breaks for employees, and that there were employees who worked overtime during that time period and they were given additional breaks of 10 minutes duration. (Tr. 36–37.)

Fincher testified that he saw the posted schedule on March 20, and that was the first time he noticed that breaks had been reduced to 10 minutes. He further testified he did not have prior notice from the Respondent of that change. (Tr. 48–49.) Thus, the Union first learned about the reduction of break times through the posting of the March 25 work schedule. (Tr. 48–49.)

5. The Respondent reduced employee breaks from 15 minutes to 10 minutes effective March 25, 2017, resulting in the Union filing a grievance over that change in working conditions

It is undisputed that the Respondent changed the breaks for employees from 15 minutes to 10 minutes effective March 25, 2017. The Union filed a step 1 grievance dated March 22, 2017, alleging that on or about March 20, 2017, the Respondent’s change in break times from 15 to 10 minutes constituted a unilateral action which affected the hours, wages, and working conditions of the bargaining unit members in violation of article 5 of the collective-bargaining agreement. (GC Exh. 5; Tr. 49–51.) In that grievance, the Union alleged that the 15 minute breaks were “binding past practice” and that breaks had been 15 minutes, which was an item “acknowledged by management in a stand-up service talks [sic] given to employees, and also in management’s VMF Labor cost breakdown provided as part of an NLRB settlement.” *Id.* The grievance requested corrective actions including for Respondent to cease and desist from such action and rescind the scheduling of breaks and lunches and return to the past practice that existed prior to March 20, 2017.¹⁰

After the parties had a step 1 meeting on March 22, 2017, the Respondent filed a step 1 answer on March 27, 2017, denying the grievance. The Respondent generated a “Grievance Summary Step 1” document and in the “Background” section of that document it set forth a statement of “all relevant information.” In that regard, the Respondent, by its supervisor, Tom Baker, stated:

On 3/3/17 all employees (including both stewards) were informed we would be posting a weekly schedule during our safety talk (see attached sign in sheet). The employees were notified the lunches and breaks would be scheduled. Management also asked if any employees wished to take a 1 hour lunch to notify management and we would schedule them for an hour lunch. Management did not receive any requests for an hour lunch so the schedule was put together and posted on 3/18/17 for the week of 3/25/1—3/31/17. (GC Exh. 7.)

As noted above, Baker made no mention in that document

¹⁰ The grievance also alleged that the Respondent’s posted schedule assigned breaks and lunches while past practice consisted of employees taking breaks and lunches whenever they saw fit, which also violated Article 5 of the collective-bargaining agreement.

that he informed employees that breaks would be reduced to 10 minutes. Furthermore, in the section of the document setting forth “Management’s Position” the Respondent indicated the grievance “should be withdrawn by the union because it is untimely,” specifically stating that “[b]oth the employees and the union were notified 3/3/17 during our safety talk that the schedule would be posted including lunches and break times.” (GC Exh. 7.) The Respondent, in that section of the document, similarly failed to mention that any statements were made regarding reducing the duration of breaks to 10 minutes. That grievance summary was written and signed by Baker, and the employee sign-in sheet for the “VMF Safety & Service Talks” meeting on March 3, 2017, was attached.

6. Effective September 26, 2017, the parties reached a step 3 grievance settlement in which Respondent restored the 15 minute breaks times

On September 26, 2017, the parties reached a step 3 settlement for the grievance in which they mutually agreed that breaks would be restored to 15 minutes immediately. (Tr. 37–38; 51; GC Exh. 6.) The step 3 settlement stated that the parties mutually agreed to the following:

The issue in this grievance is Management unilaterally changing the duration of breaks at the Toledo VMF from 15 minutes to 10 minutes. The Parties at Step 3 discussed this matter with Management and we are in agreement that breaks shall be restored to 15 minutes immediately.

Fincher testified that he was notified on September 28, 2017, that the breaks had been restored to 15 minutes as a result of the settlement, and that with regard to the remainder of the grievance concerning the Respondent’s scheduling of breaks and lunches, the Union did not press the fact that was instituted in March 2017.

B. The Contentions of the Parties

The General Counsel contends that the Respondent did not provide the Union with notice of the change in break duration, and in particular that the Respondent did not state in the March 3rd safety meeting that it was making that change. The General Counsel further argues that even if the Respondent provided the employees with notice of that change on March 3rd, such an announcement to employees did not constitute notice to the Union. Therefore, the General Counsel contends that Respondent presented the Union with a *fait accompli* when it reduced the duration of the breaks on March 25, 2017, and that such conduct violated Section 8(a)(5) and (1) of the Act.

The Respondent, on the other hand, contends that it provided the Union with notice of its intent to change the breaks from 15 to 10 minutes when it allegedly announced such in the March 3rd meeting with employees, and therefore the Union was provided an opportunity to bargain over that change and it simply waived that right to bargain by neglecting to do so. As mentioned above, I have determined the evidence establishes that Respondent did not inform employees in the March 3 meeting that breaks would be reduced to 10 minutes. In addition, the Respondent alleges that even if it failed to provide the Union with notice of that change, it was not obligated to do so because “it is questionable whether the reduction in break times was

even a material change in terms and conditions of employment for members of the Unit.” (R. Br. p. 9.) Finally, the Respondent alleges that even if a violation of the Act is found, backpay should not be awarded as a remedy. (R. Br. p. 9.)

C. Analysis

Section 8(a)(1) and (5) of the National Labor Relations Act provide that it shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

....

- (5) to refuse to bargain collectively with representatives of his employees, subject to the provisions of section 9(a).

While Section 8(a)(5) establishes that an employer’s refusal to bargain collectively may constitute an unfair labor practice, Section 8(d) of the Act defines collective bargaining, stating in part, that:

to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages, hours, and other terms and conditions of employment*....[Emphasis added.]

Subjects falling under the language of Section 8(d) are mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). “Section 8(a)(5) . . . read together with Section 8(d), requires an employer to bargain collectively with the representative of his employees ‘with respect to wages, hours, and other terms and conditions of employment.’” *Id.* See also *Overnite Transportation Co. v. NLRB*, 372 F.2d 765, 768–769 (4th Cir. 1967), cert. denied 389 U.S. 838 (1967). An employer is obligated to provide a union with notice and a meaningful opportunity to bargain concerning changes in terms and conditions of employment that are mandatory subjects. *NLRB v. Katz*, 369 U.S. 736, 742, 747 (1962). It is well settled that, absent certain circumstances,¹¹ “an employer acts in violation of Section 8(a)(1) and (5) of the Act by unilaterally, without affording its employees’ exclusive collective-bargaining representative an opportunity to bargain on their behalf, materially and substantially changing the employees’ terms and conditions of employment.” See *Washington Beef, Inc.*, 328 NLRB 612, 617 (1999), and cases cited therein; see also *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987). Thus, an employer’s duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to first notify and bargain with the union before it effects change in mandatory subjects of bargaining, and the failure to bargain or to provide the opportunity to bargain over such changes have been found to violate Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, supra. The Board has held, however, that the change unilaterally imposed must be “a material, substantial, and significant one.” *Peerless Food Products, Inc.*, 236 NLRB 161 (1978); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

In this case it is undisputed that from March 25, 2017, to

¹¹ See *NLRB v. Katz*, 369 U.S. 736, 748 (1962).

September 26, 2017, Respondent reduced paid breaks from 15 to 10 minutes for unit employees, and that such a reduction in break times related to wages, hours, and other terms and conditions of employment of the employees.¹² I therefore find that the change or reduction in break times was a mandatory subject for the purposes of collective bargaining.

I further find that the Respondent's change in break times was clearly a material, substantial, and significant change in employees' terms and conditions of employment. *Peerless Food Products, Inc.*, supra; *Alamo Cement Co.*, supra. On that subject, the Respondent's assertion that "it is questionable whether the reduction in break times . . . [is] a material change in terms and conditions of employment . . . " is without merit and must be dismissed. This case involves changes to working hours and break times—core subjects to which the statutory bargaining obligation applies and which are daily conditions of employment. The Board has found that similar changes to break or lunch times have had a material, substantial, and significant effect or impact on employees' terms and conditions of employment. *Rangaire Co.*, 309 NLRB 1043 (1992) (employer discontinued past practice of providing an extra 15 minutes of paid lunchbreak once per year on Thanksgiving); *Atlas Microfilming*, 267 NLRB 682, 695–696 (1983), enfd. 753 F.2d 313 (3d Cir. 1985) (employer added 15 minutes to the employees' lunch period). The Board has thus found that lunch and break periods may constitute terms and conditions of employment and that unilateral changes to such lunch and break periods are material, significant, and substantial changes violating Section 8(a)(5) and (1) of the Act. *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 903 (2000).

In addition, I note that the cases cited by the Respondent in support of its assertion that the change was not material are distinguishable and not controlling. The Respondent cited *Mitchellace, Inc.*, 321 NLRB 191 (1996). In that case the General Counsel alleged that the employer changed its policy specifying when employees had to be back at their work stations by requiring them to have returned to their work areas at the end of their lunch and break times, and not simply be on their way back to their work stations. Id. at 192. However, the Board affirmed the administrative law judge's finding that the employer's breaktime action did not have a material, substantial, and significant impact on working conditions because the action "made no change" as the evidence established the policy had been that employees were to remain at their work stations until the break started and were to be back at their work stations at the time the break ended, even though there were times when that rule was not enforced. Id. at 192–193. That case is clearly distinguishable from the instant case where the breaks were historically 15 minutes and they were undisputedly changed to 10 minutes.

The other case cited by the Respondent, *Postal Service*, 275 NLRB 360 (1985), is similarly distinguishable. In that case, the administrative law judge found the employer violated the Act

by unilaterally reducing rest breaks for certain clerical employees from 15 to 10 minutes without notifying and bargaining with the union. Id. at 360. However, the Board found that the employer had consistently maintained and posted the rule limiting the time of the breaks to 10 minutes. In addition, even though there was some evidence of nonenforcement for employees who took 15 minute breaks (a fact relied on by the judge), employees acknowledged posted signs stating that breaks were 10 minutes and the employer, on several occasions, attempted to enforce the 10 minute break rule. Id. The Board therefore reversed the judge's finding that there was an obligation to bargain and it did not agree with the determination that the employer violated the Act by uniformly applying its established general rest period of 10 minutes duration. Id. Thus, the cases relied upon by Respondent differ from the facts of the instant case where there was undisputedly a reduction in established break times.

The evidence in this case establishes that the Respondent unilaterally changed break times without affording the Union advance notice and an opportunity to bargain over that change, or the effects of that change. The Respondent did not inform the Union of the reduction in break times prior to posting the schedules implementing that change. In that connection, as mentioned above, there is no merit to the Respondent's contention that it informed employees in the March 3 meeting that their breaks were being reduced to 10 minutes, and the witness testimony offered to support that contention was neither credible nor plausible, and it was not supported by the record evidence. However, I note that even if the Respondent had made such an announcement to employees in that meeting, the Board has found that informing employees of a change in working conditions is insufficient to constitute notice to the Union. *Champion International Corp.*, 339 NLRB 672, 672 fn. 3 (2003) (where the Board found the fact that union officials learned of the change in working conditions by the employer's distribution of a letter to employees, did not constitute evidence that the employer provided the union with advance notice and an opportunity to bargain).

It is well established that where the manner of the respondent's presentation of a change in terms and conditions of employment to the union precludes a meaningful opportunity for the union to bargain, the change is a *fait accompli* and a failure by the union to request bargaining will not constitute a waiver. *Aggregate Industries*, 359 NLRB 1419, 1422 (2013); See e.g., *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). I find that the Respondent presented the Union with a *fait accompli* when it failed to provide advance notice and an opportunity to bargain over the reduction in break times. The announcement of the change was made when the Respondent posted the work schedules for employees, without special or advance notice to the Union, and the union officers became aware of that change the same way the other employees were notified. See *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) (where the Board, in determining whether an employer's announcement of a change constitutes a *fait accompli*, held that the "most important factor" was that it was made without advance notice to the union and the union officers became aware "merely because they themselves were employ-

¹² The Respondent admitted the allegations that the subjects relate to wages, hours, and other terms and conditions of employment, and that they are mandatory subjects of bargaining as set forth in complaint/compliance specification pars. 7(A) and 7(B). (GC Exh. 1(k).)

ees.”) The fact that the Respondent informed the Union of the change in employee break times through its posted work schedule precluded any meaningful bargaining and divested the Union of its obligation to demand bargaining or have inaction construed as a waiver. *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986) (“It is . . . well established that a union cannot be held to have waived bargaining over a change that is presented as a fait accompli . . .”) citing *Gulf States Mfg. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983). I further find that the Respondent had an obligation to bargain with the Union over the effects of such a change in working conditions, which it similarly failed to do.

As this case involves working hours and break times—core subjects to which the statutory bargaining obligation applies and a daily condition of employment that the collective-bargaining representative is counted on to protect, the Respondent’s unilateral change to that term and condition of employment conveyed to the employees that their bargaining representative had no voice in the matter. See *Kurdziel Iron*, supra at 156. It is well established that “the real harm in an employer’s unilateral implementation of terms and conditions of employment is to the Union’s status as bargaining representative, in effect undermining the Union in the eyes of the employees.” *Page Litho, Inc.*, 311 NLRB 881 (1993); See *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 fn. 15 (1967). Unilateral actions with respect to any mandatory subjects of bargaining, such as lunch and break periods, are prohibited “for it is a circumvention of the duty to negotiate which frustrates the objective of Section 8(a)(5).” *NLRB v. Katz*, supra at 743. In fact, the Board has held that even the announcement or threat of a unilateral reduction in lunch and break times violated Section 8(a)(5) and (1) of the Act. *Kurdziel Iron of Wauseon*, 327 NLRB 155 (1998). In *Kurdziel*, the employer announced a reduction in lunch and break times, but never implemented them. In that case, the Board held that:

Even if the announced reduction did not finally result in the actual curtailment of employees’ breaks, the damage to the bargaining relationship was accomplished. This occurred ‘simply by the message to employees that the Respondent was taking it on itself’ to set an important term and condition of employment, thereby suggesting the irrelevance of the employees’ collective-bargaining representative. *Id.* at 155, citing *ABC Automotive Products, Corp.*, 307 NLRB 248, 250 (1992).

In addition, such unilateral change may also be evidence of overall bad-faith bargaining, especially where an employer announces proposed changes to employees before notifying the union. *Food Mart*, 158 NLRB 1294 (1966), *enfd. NLRB v. Agawam Food Market, Inc.*, 386 F.2d 192 (1st Cir. 1967).

Accordingly, the Respondent’s failure to bargain or provide the Union with advance notice and an opportunity to bargain over the reduction in employee break times from 15 to 10 minutes from March 25, 2017, to September 26, 2017, and its failure to bargain over the effects of that unilateral change, constitute violations of Section 8(a)(5) and (1) of the Act.

D. Deferral to the Grievance Settlement is not Appropriate

While the Respondent asserted as an affirmative defense in its answers to the complaint and the amended complaint/compliance specification, that this matter “should be deferred to the parties’ grievance/arbitration process,” it did not set forth any such argument at trial or in its posthearing brief. Even if the Respondent would have set forth such an argument, I find that deferral to the parties’ grievance settlement is not appropriate.

At the time the complaint issued in this matter the grievance was not resolved, and the Respondent summarily denied the grievance, asserting its management rights and that the grievance was allegedly untimely filed. Prior to the instant hearing, the grievance was processed to step 3, and was resolved by the Union’s national business agent, William Wright, and the Respondent’s labor relations specialist, Eric Conklin, without consultation with the officials of the Charging Party or any of the employees affected by the Respondent’s actions. (GC Exh. 6.) As mentioned above, on September 26, 2017, the parties reached a step 3 settlement for the grievance in which they mutually agreed that breaks would immediately be restored to 15 minutes. (Tr. 37–38; 51; GC Exh. 6.) It is undisputed that the grievance settlement provided only that the 15 minute breaks would be restored, without any provision for notifying employees or for making them whole for the additional time worked without pay due to the Respondent’s unlawful unilateral change in working conditions. The settlement was entered into after approximately 6 months of the unit employees working additional time without compensation and contrary to the past practice, resulting in backpay which the parties agreed totaled \$11,585.89. (Jt. Exh. 1.)

In *Alpha Beta*, 273 NLRB 1546 (1985), review denied 808 F.2d 1342, 1345–1346 (9th Cir. 1987), the Board held that in deciding whether to defer to a settlement agreement reached between an employer and union pursuant to their contractual grievance/arbitration machinery, it applies the principles of *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1995), and *Olin Corp.*, 268 NLRB 573, 573–575 (1984). In *Alpha Beta*, the Board examined whether the settlement proceedings were fair and regular; whether all parties agreed to be bound by the settlement; whether the parties considered the facts underlying the unfair labor practices; and whether the award was repugnant to the Act.

In considering the first *Alpha Beta* factor, whether the settlement proceedings were fair and regular, it appears they were fair and regular, but the grievance proceedings were limited to steps 1 and 2 of the procedure, and at no time was the substantive issue considered beyond the alleged untimeliness of the grievance. In addition, the settlement was entered into after approximately 6 months of the employees working additional time for no pay which amounted to over \$11,000. In considering the second *Alpha Beta* factor, whether all parties agreed to be bound by the settlement, the record shows the parties had agreed to be bound, however, the evidence also shows that it was resolved by the Union’s national business agent, without consultation with the officials of the Local Union or any of the employees affected by the Respondent’s actions. (GC Exh. 6.)

In considering the third *Alpha Beta* factor, whether the par-

ties considered the facts underlying the unfair labor practices, the evidence fails to show that the parties considered such facts. The evidence establishes that the grievance was settled on the regional level, without the involvement of the Local Union, which represents the employees involved in this case. (Tr. 51–52.) The record is devoid of any evidence that when they settled the grievance, the business agent for the national Union and the Respondent’s labor relations specialist considered the fact from the underlying unfair labor practice charge that the employees had worked additional time without compensation and were owed \$11,585.89. I find this factor does not weigh in favor of deferral.

In considering the fourth and final *Alpha Beta* factor, whether the award was repugnant to the Act, I find that the results of deferring to the settlement that did not include any notice to the employees that the Respondent’s unlawful unilateral activity infringed on their Section 7 rights under that Act, and did not provide for compensation for the damages caused by the unlawful activity, would be repugnant to purposes and policies of the Act. The evidence establishes that the Respondent unlawfully and unilaterally imposed the reduced breaks. As set forth in the “Remedy and Compliance Specification” section below, restoration of the status quo ante includes not only rescission of its unlawful action and any direct consequences from its unlawful conduct, but also a make-whole remedy to compensate employees for the significant pecuniary losses they suffered as a result of the Respondent’s unfair labor practices. Deferring to a settlement that fails to provide back pay to make employees whole for the losses they suffered as a result of the Respondent’s unlawful action is repugnant to the Act. See *Dunham-Bush, Inc.*, 264 NLRB 1347, 1349 (1982) (the Board did not defer to an arbitration award which failed to provide back pay for the unlawful discharge); See also, *Cessna Aircraft Co.*, 220 NLRB 873, 875 (1975) (Board found arbitration award fashioned a remedy that was repugnant to the purposes and policies of the Act as it departed from “longstanding Board principles” by ordering reinstatement without providing that the employee be made whole for the period of time prior to his return to work). Moreover, the settlement in the instant case fails to provide for remedial notice posting to notify employees of their rights under the Act, nor does it reflect that the Respondent will cease and desist from the commission of such unfair labor practices and that it will affirmatively remedy the unfair labor practices it has committed.

Under the terms of the grievance settlement, there is no evidence that employees are even aware of the grievance settlement, or that there is any accountability for the Respondent’s unlawful unilateral change to working conditions. Requiring Respondent’s rescission of its unlawful change without any accountability for its unlawful conduct, notice to employees of their rights under the Act, or compensation for employees to make them whole for the unlawful actions taken against them, does not preserve or protect their rights under the Act. The grievance settlement in this case is thus repugnant to the purposes and policies of the Act, and this *Alpha Beta* factor weighs against deferral. In addition, I note that there would be no Notice posting, notifying employees of their rights under the Act and reflecting that the Respondent will cease and desist

from committing unfair labor practice, and affirmatively remedy the unfair labor practices it has been found to have committed. This fact further establishes that the final factor does not weigh in favor of deferral.

In evaluating the *Alpha Beta* factors, I find that two factors weigh against deferral, and most significantly, that deferral to the settlement would be repugnant to the purposes and policies of the Act. Thus, under an *Alpha Beta* analysis, deferral is not an appropriate substitute for the Board’s well-established remedial processes.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the Respondent by virtue of Section 1209 of the Postal Reorganization Act (PRA).
2. The American Postal Workers Union, Local 170 is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the follow unit of employees:

All maintenance employees, motor vehicle employees, postal clerks, the special delivery messengers, mail equipment shops employees, material distribution centers employees, and operating services and facilities services employees; and excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined in Public Law 91-375, 1201(2), all Postal Inspection Service employees, employees in the supplemental work forces as defined in Article 7 of the Collective-Bargaining Agreement, rural letter carriers, mail handlers, and letter carriers.

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by unilaterally reducing paid break periods from 15 minutes to 10 minutes from about March 25, 2017, to September 26, 2017, for unit employees employed at its Motor Vehicle Maintenance Facility in Toledo, Ohio, without providing prior notice to the Union and without affording the Union an opportunity to bargain over that change, and the effects of such a change.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The remedy in this case includes an order to cease and desist from that action and the affirmative action of a make-whole provision to those employees affected by the Respondent’s unlawful unilateral action from March 25, 2017, through September 26, 2017. As explained more fully in the “Remedy and Compliance Specification” section below, the names of the employees and the respective amounts of backpay owed are set forth by stipulation of the parties in Joint Exhibit 1 (incorporated into the Compliance Specification by motion at the trial), which totals \$11,585.89, plus interest.

REMEDY AND COMPLIANCE SPECIFICATION

It is well established that the objective in compliance proceedings is “to restore, to the extent feasible, the status quo ante by restoring the circumstances that would have existed had there been no unfair labor practices.” *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), citing *Phelps-Dodge Corp. v. NLRB*,

313 NLRB 177, 194 (1941). When remedying an unlawful unilateral change in terms and conditions of employment, the Board typically orders a respondent to cease and desist from making unilateral changes and to rescind the unlawful change, thus restoring the status quo ante. See, e.g., *Bohemian Club*, 351 NLRB 1065, 1068 (2007); *Benteler Industries*, 322 NLRB 715, 721 (1996), enf. mem. 149 F.3d 1184 (6th Cir. 1998). Having found that the Respondent has violated the Act and thereby engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist from such actions and that it be ordered to take certain affirmative action designed to effectuate the policies of the Act, such as restoring the break times to 15 minutes duration. However, with regard to restoring the status quo ante, I note that in this case the record establishes the Respondent restored the employees' breaks to 15 minutes on September 27, 2017, pursuant to a grievance settlement. Thus, I recognize that the Respondent has already taken this affirmative action, and that the violation of the Act occurred for a closed period of time, from March 25, 2017, to September 26, 2017.

In addition, with regard to affirmative actions required to remedy these types of cases, "the Board's standard remedy in 8(a)(5) cases involving unilateral changes resulting in losses to employees is to make whole any employee affected by the change." *Grand Rapids Press*, 325 NLRB 915, 916 (1998), enf. mem. 208 F.3d 214 (6th Cir. 2000); see *Trim Corp. of America*, 349 NLR 608–609 (2007); see also *Rangaire Co.*, 309 NLRB 1043, 1043 fn. 6 (1992). On that issue, the Respondent argues that if it is found to have violated the Act by unilaterally reducing break times to 10 minutes, the employees affected should not be entitled to backpay because the breaks provided were "paid breaks," and employees were paid for a full 8 hours of work regardless of whether they worked on their break time. In addition, it asserts that backpay is not justified because the Union did not request backpay as a remedy in its grievance and no backpay was provided in the parties' grievance settlement. The General Counsel contends that the Respondent should be ordered to make employees whole for their losses, which includes backpay, because they were required to work additional time per day as a result of their shortened break times.

It is well established that the finding of an unfair labor practice is presumptive proof that some backpay is owed. *Lorge School*, 355 NLRB 558, 560 (2010); *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 36 (1991), enf. 952 F.2d 1393 (3rd Cir. 1991). The General Counsel's burden in a backpay proceeding is limited to showing the gross backpay due to each discriminatee. Once the General Counsel meets its burden of showing the gross backpay owed, the burden shifts to the respondent to establish facts that negate or mitigate its liability. *St. George Warehouse*, 351 NLRB 961, 963 (2007); *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006), enf. 260 Fed. Appx. 607 (4th Cir. 2008).

After considering the positions of the parties on this issue, I find the Respondent's arguments lack merit. Employees were paid for 8 hours of work, which included two 15 minute time periods when they were compensated, but not required to work. As a result of reducing the 15 minute breaks to 10 minutes, the employees were required to perform work for an additional 5

minutes per break, for a total of 10 minutes per shift. The fact that some employees may have voluntarily work on their paid breaks without additional compensation does not mean that employees who were forced to work when they should not have been working, should not be compensated for working that extra time. Prior to March 2017, when their breaks were 15 minutes, the employees had 7 hours and 30 minutes of productivity or work time for which they were compensated. (Tr. 55.) However, when the breaks were reduced to 10 minutes, the employees had 7 hours and 40 minutes of productivity or work time, and it is undisputed that those employees did not receive compensation for that extra 10 minutes per day of productivity that they worked between March 25 and September 26, 2017. (Tr. 55.) Respondent Manager Dale Patterson admitted at trial that the reduction in break times resulted in employees having to provide the Respondent an extra 10 minutes of service per shift. (Tr. 110–113.) It stands to reason that requiring employees to work for an additional 10 minutes per day when they should not have been working is a damage that should be compensated and remedied to make them whole for their losses. In fact, the Board has "traditionally ordered that employees be made whole for any benefits unilaterally discontinued by the Employer in violation of Section 8(a)(5) of the Act," and that includes directing "a make-whole remedy for any loss of pay employees may have suffered as a result of [a] change in [a] lunchbreak practice and length of workday." *Atlas Tack Corporation*, 226 NLRB 222 (1976).

I find the Respondent's argument that backpay should not be awarded because it was not alleged in the grievance or provided as part of the grievance settlement, is misplaced and lacks merit. The Respondent failed to cite any case law which supports its assertion that backpay should not be awarded for losses caused by an unfair labor practice, just because such a remedy was not provided for in the settlement of a grievance. Such an assertion is simply nonsensical and without support. The Respondent also argues that the "charge never sought backpay as a remedy" and therefore "[t]he claim for backpay is untimely and should be barred under Section 10(b)." (R. Br. p. 9.) The Respondent did not assert its 10(b) argument as an affirmative defense in its answers to either the complaint or the amended complaint/compliance specification, and it did not assert such a defense at trial. Instead, it first raised the 10(b) argument in its posthearing brief. (R. Br. pp. 8–9.) As the Respondent failed to assert its 10(b) defense until its post-hearing brief, the argument is rejected as untimely. *Alternative Energy Applications, Inc.*, 361 NLRB No. 139 (2014); See, e.g., *Paul Mueller Co.*, 337 NLRB 764, 764–765 (2002) (respondent waived its 10(b) defense by failing to assert it until its posthearing brief to the administrative law judge).¹³

¹³ Even if the Respondent's 10(b) argument was timely, it lacks merit and I would dismiss it on the merits as neither the Board's Rules and Regulations, Series 8, as amended, Sec. 102.15, nor its well-established practice and procedure, requires that the proposed remedy be alleged in the charge, or even in the complaint. "It is for the Board to fashion the remedy which it deems appropriate to undo the effects of the unfair labor practices found to have been committed." *Local 964, Carpenters*, 184 NLRB 625, 625–626 (1970); enf. *NLRB v. Local 964, United Brotherhood of Carpenters*, 447 F.2d 643 (1971).

I find that the General Counsel has met its burden establishing that gross backpay is due each employee affected by the unfair labor practice committed. As a result of the Respondent's unlawful action of unilaterally reducing paid break periods from 15 to 10 minutes from March 25, 2017, to September 26, 2017, the unit employees set forth below are entitled to backpay for the wages they earned while working when they should not have been working. I further find that the Respondent has failed to establish any facts that would negate or mitigate its liability. *St. George Warehouse*, supra; *Parts Depot, Inc.*, supra.

Based on my finding that backpay is due the affected employees in this matter, the Respondent and General Counsel stipulated that Joint. Exhibit 1 reflects the damages owed to employees as a result of the decrease in break times. (Tr. 11.) Each employee took varying breaks and they had different rates of pay, and the computation is based on the number of breaks each individual earned on their shift and overtime. The number of breaks were multiplied by the rate of pay and divided by 60 to convert the figure into hours. (Tr. 11.) Specifically, the backpay is calculated based on the unit employee's hourly rate times the number of break periods reduced from March 25, 2017, through September 26, 2017, times five (5) minutes or .08333 hour.¹⁴ In addition, the parties stipulated that the figures in Joint. Exhibit 1 replaced the calculations set forth in paragraphs 12 and 13 of the complaint/compliance specification.¹⁵

It is thus recommended that the Respondent be ordered to pay the affected employees backpay as set forth below. In that connection, the parties stipulated that the backpay amounts owed to Unit employees as a result of Respondent's unlawful conduct are as follows:

EMPLOYEE	1 ST Q 2017	2 ND Q 2017	3 RD Q. 2017	TOTAL
Joseph Basile	\$ 26.92	\$ 269.18	\$ 276.83	\$572.93
Tim Bennett	\$ 18.35	\$ 305.85	\$ 239.03	\$ 563.24
Ronald Cowell	\$ 15.40	\$ 268.34	\$ 275.21	\$ 558.94
Michael Fincher	\$ 21.54	\$ 256.14	\$ 266.13	\$ 543.81
Dawn Hamilton	\$ 22.61	\$ 269.04	\$ 18.17	\$ 309.83
Brandon Holly	\$ 31.18	\$ 423.18	\$ 469.83	\$ 924.18
Anthony Horvath	\$ 30.39	\$ 478.67	\$ 356.20	\$ 865.26
J.R. Jackson	\$ 24.47	\$ 269.18	\$ 251.21	\$ 544.86
Mark Mabry	\$ 36.87	\$ 458.18	\$ 388.53	\$ 883.57
Ryan Perry	\$ 17.02	\$ 223.09	\$ 264.69	\$ 504.80
Greg Piskula	\$ 28.75	\$ 395.25	\$ 388.73	\$ 812.73
Joel Pitzen	\$ 18.91	\$ 217.42	\$ 234.90	\$ 471.23

¹⁴ The describing the stipulation, the parties indicated that the hourly rate for employees changed on September 2, 2017, when a raise in pay was made effective, and even though the employees were under previous rates of pay, for convenience that parties put them into the third quarter figures for 2017. (Tr. 12.)

¹⁵ The parties stipulated that the figures are set forth by quarter of work for ease in computing interest if a violation is found. (Tr. 13.)

Stephen Recknagel	\$ 36.52	\$ 463.40	\$ 340.64	\$ 840.57
Tom Robertson	\$ -	\$ -	\$ 168.59	\$ 168.59
Robin Sanchez	\$ -	\$ -	\$ 62.66	\$ 62.66
Eric Schneider	\$ 19.57	\$ 284.69	\$ 302.81	\$ 607.08
Edwin Smith	\$ 12.66	\$ 384.96	\$ 295.84	\$ 693.47
Rodriguez Strother	\$ -	\$ -	\$ 154.62	\$ 154.62
Eric Weinreich	\$ 23.92	\$ 166.14	\$ 334.93	\$ 624.99
Shelly Wittenauer	\$ 42.66	\$ 445.26	\$ 390.62	\$ 878.54
TOTAL				\$11,585.89

The make whole remedy in this case shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). That remedy shall include interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, the Respondent shall be ordered to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed by Board order, submit and file with the Regional Director for Region 8 a report allocating the backpay awards to the appropriate calendar years for said employees. The Regional Director will then assume responsibility for transmission of the reports to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, United States Postal Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the American Postal Workers Union, Local 170, as the exclusive representative of its unit employees by unilaterally changing or reducing paid employee break periods from 15 to 10 minutes without bargaining or providing the Union with notice and an opportunity to bargain over that change or the effects of that change.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful unilateral change found in this decision and restore the status quo ante which it appears the Re-

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

spondent has already accomplished when it restored the 15 minute breaks for the employees on September 26, 2017.

(b) Make whole bargaining unit employees in the manner set forth in the “Remedy and the Compliance Specification” section herein, for any loss of pay they may have suffered as a result of the unilateral reduction of paid break times from 15 minutes to 10 minutes from March 25, 2017, to September 26, 2017, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and it shall include interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed by Board order, submit and file with the Regional Director for Region 8 a report allocating the backpay awards to the appropriate calendar years for said employees. The Regional Director will then assume responsibility for transmission of the reports to the Social Security Administration at the appropriate time and in the appropriate manner.

(c) Within 14 days after service by the Region, post at its facility in Toledo, Ohio, copies of the attached notice marked “Appendix.”¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 25, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

SUPPLEMENTAL ORDER

IT IS HEREBY ORDERED that Respondent, the United States Postal Service, its officers, agents, successors, and assigns, shall pay the amounts of backpay set forth in the compliance specification and Joint Exhibit 1, which total \$11,585.89 to the following employees:

EMPLOYEE	1 ST Q 2017	2 ND Q 2017	3 RD Q 2017	TOTAL
Joseph Basile	\$ 26.92	\$ 269.18	\$ 276.83	\$ 572.93
Tim Bennett	\$ 18.35	\$ 305.85	\$ 239.03	\$ 563.24
Ronald Cowell	\$ 15.40	\$ 268.34	\$ 275.21	\$ 558.94
Michael Fincher	\$ 21.54	\$ 256.14	\$ 266.13	\$ 543.81
Dawn Hamilton	\$ 22.61	\$ 269.04	\$ 18.17	\$ 309.83
Brandon Holly	\$ 31.18	\$ 423.18	\$ 469.83	\$ 924.18
Anthony Horvath	\$ 30.39	\$ 478.67	\$ 356.20	\$ 865.26
J.R. Jackson	\$ 24.47	\$ 269.18	\$ 251.21	\$ 544.86
Mark Mabry	\$ 36.87	\$ 458.18	\$ 388.53	\$ 883.57
Ryan Perry	\$ 17.02	\$ 223.09	\$ 264.69	\$ 504.80
Greg Piskula	\$ 28.75	\$ 395.25	\$ 388.73	\$ 812.73
Joel Pitzen	\$ 18.91	\$ 217.42	\$ 234.90	\$ 471.23
Stephen Recknagel	\$ 36.52	\$ 463.40	\$ 340.64	\$ 840.57
Tom Robertson	\$ -	\$ -	\$ 168.59	\$ 168.59
Robin Sanchez	\$ -	\$ -	\$ 62.66	\$ 62.66
Eric Schneider	\$ 19.57	\$ 284.69	\$ 302.81	\$ 607.08
Edwin Smith	\$ 12.66	\$ 384.96	\$ 295.84	\$ 693.47
Rodriguez Strother	\$ -	\$ -	\$ 154.62	\$ 154.62
Eric Weinreich	\$ 23.92	\$ 166.14	\$ 334.93	\$ 624.99
Shelly Wittenauer	\$ 42.66	\$ 445.26	\$ 390.62	\$ 878.54
TOTAL				\$11,585.89

As mentioned above, the make whole remedy shall be in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and it shall include interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent also shall compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed by Board order, submit and file with the Regional Director for Region 8 a report allocating the backpay awards to the appropriate calendar years for said employees. The Regional Director will then assume responsibility for transmission of the reports to the Social Security Administration at the appropriate time and in the appropriate manner.

Dated, Washington, D.C. May 25, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the American Postal Workers Union, Local 170 (the Union) by making unilateral changes to terms and conditions of employment, such as reducing employee breaks from 15 to 10 minutes, without bargaining or affording the Union advance notice and an opportunity to bargain over that change or the effects of that change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL cease and desist from making unilateral changes to paid employee breaks without bargaining or providing the Union an opportunity to bargain over that change or the effects of that change, and we have rescinded the unlawful unilateral change and restored the status quo ante when we restored the 15 minute breaks on September 27, 2017.

WE WILL make whole bargaining unit employees for any loss of pay they may have suffered as a result of the unilateral reduction in paid break times from 15 to 10 minutes from March 25, 2017, to September 26, 2017, with interest.

UNITED STATES POSTAL SERVICE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/08-CA-197451 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

